

REMARKS

The above noted Final Office Action and the references cited therein have been carefully considered and, in view of the amendments herein to the claims and the following representations, reconsideration of the application in its present form is respectfully requested.

This Amendment is also accompanied by the Section 132 Declaration of Co-Applicant Meghan Joy Musgnug, who has worked for four years in the bagel food service industry during summer and winter vacation in high school and college, and who developed, with Co-Applicant Elizabeth Chelsea Teich, the claimed subject matter of the present invention. In connection therewith, Applicants refer to the photographs presented as informal drawing figures in Applicants' related provisional patent application filed under serial number 60/404,842 of August 21, 2002. As noted in the attached Section 132 Declaration, those photographs show the claimed bagel scooper in actual use by Co-Applicant Meghan Joy Musgnug.

Concerning the specifics of the Final Office Action noted above, first, with respect to the Abstract, the computer identifier phrase "teich-musgnug bagel scoop appl" has been deleted.

With respect to the recitation of three functions for the bagel scoop on page 5 at lines 24-25, paragraph 0035 has been amended to recite the dough hollowing out function recited therein as being the third function of the bagel scooper.

Concerning the lack of antecedent basis for "manually held scoop" in view of "bagel scoop" in Claims 1, 3, 4 and 6, the phrase in all places has been amended to read

"manually held bagel scoop", since that is recited in the "Field of the Invention" at the beginning of the specification.

Concerning the indefiniteness of Claim 9 under 35 USC 112, second paragraph, Claim 9 now recites that is a dependent Claim, depending from independent Claim 8.

With respect to the new matter objection under 35 USC 132 and the rejection under 35 USC 112, first paragraph, as to the scoop 3 extending perpendicular off of the handle 2, paragraph 0048 has been amended instead to recite that Figure 2 shows that a tangent to the center of handle 2 is at a right angle to a tangent to the top of the bowl shaped wall 3e. This feature is clearly shown when viewing the side elevational view of Figure 2.

The specification is also amended at paragraph 0048 to recite as follows:

-- Figure 2 is a side view of bagel scoop 1. Starting from optional small scoop scraper 5 at the bottom of Figure 2, continuing up handle 2 and further to stem portion 4 and terminating at the distal end 3A of scoop structure 3, no inflection points are encountered, as the shape of the curvature is constantly concave (to the left in Figure 2), albeit of varying arc radii. Note that a tangent to the right side center of handle 2 is at a right angle to a tangent to the top of the bowl shaped wall 3e of the scoop structure; this geometric relationship is key to the ergonomic design of bagel scoop 1.--

No new matter is added to the specification, since a concise review of drawing Figure 2 clearly shows what is being recited in amended paragraph 0048, namely, that the consistent curvature of the bagel scooper of the present invention contains no inflection points, and that the

are modeled upon Sections 5 and 12 of the FTC Act and the statutes share essentially the same legal elements. Song v. Ives Lab'ys, Inc., 957 F.2d 1041, 1048 (2d Cir. 1992) ("It is clear that a judge sitting at equity may not render a verdict which is inconsistent with that of a jury sitting at law on a claim involving the same essential elements.") (internal citations omitted) (alteration in the original); see also e.g., Oswego Laborers' Loc. 214 Pension Fund v. Marine Midland Bank, N.A., 85 N.Y.2d 20, 26 (1995) (noting that the New York General Business Law statutes are modeled on the FTC Act), Bildstein v. MasterCard Int'l Inc., 329 F. Supp. 2d 410, 414 (S.D.N.Y. 2004) (collecting cases). Therefore, the jury's factual findings regarding the eight Challenged Statements, which are supported by the record at trial, are binding on this Court's determination of the Quincy defendants' liability under Sections 5 and 12 of the FTC Act.

Applying the jury's factual determinations, which are determinative of the Quincy defendants' liability under Sections 5 and 12 of the FTC Act, the Court finds that the Quincy defendants acted as a common enterprise and are liable for the statements "Prevagen reduces memory problems associated with aging" and "Prevagen is clinically shown to reduce memory problems associated with aging" under the FTC Act Sections 5 and 12.

So ordered.

Dated: New York, New York
August 29, 2024

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not designed for the force required to perform a bagel scoop function. The spoon of Green '951, as well as other previous inventions noted by the Examiner, is designed specifically for an upward scooping motion, not a downward scooping motion as in the bagel scooper of the present invention.

According to standard geometric mathematical definitions, there is a definition number "5" under "inflection" in the AMERICAN COLLEGE DICTIONARY, Clarence L. Barnhart, Editor, Random House, NY, circa 1955 copyright, as follows :

"Math. a change of curvature from convex to concave or vice versa".

In connection therewith, the Manual of Patent Examining Procedure MPEP 2163.07 states as follows:

"The mere inclusion of dictionary or art recognized definitions known at the time of filing an application would not be considered new matter".

The cited prior art of Green '951 and Thomas '307 has that reverse curvature point of inflection in any embodiment, but Applicant's device does not. As a matter of fact, unlike the continuously concave curvatures of the present bagel scooper, all of the other kitchen food implements noted as not being cited against the Claims, namely US Patent Nos. 6,145,204 of Cash, 4,825,551 of Sherblom and 5,182,860 of Kuhlman, each contain detrimental points of inflection.

No new matter is added by the foregoing amendment, since the drawings clearly show the varying concave arcs of the bagel scooper, without any inflections, such as the inflections which are clearly present in the cited art of Green '951.

For example, Green '951 teaches using its serrated spoon instrument more for scraping food, such as corn for people with poor or no teeth. However, the reference

actually does not teach the use of scooping interior dough by rearward pulling, such as bagel dough.

Green '951 is concerned with an upwardly facing shallow concave bowl with serrated teeth to advance forwardly against fruit and vegetable pulp. Its concave bowl extends substantially parallel to the longitudinal axis of the handle of the spoon.

As noted in the Section 132 Declaration of Co-Applicant Meghan Joy Musgnug, use of Green '951 to scoop bagels is unsatisfactory, because its scoop is axially aligned with the handle. It does have the downward facing concave bowl, preferably approximately at a 90° angle, for pulling the excess dough out. Additionally, the inflection point located between the spoon portion and the handle is subject to bending or breakage, unlike the consistently concave scoop and handle of the present invention.

In fact, as noted in the attached 132 Declaration of Co-Applicant, Green '951's upwardly facing concave bowl hinders its effectiveness in scooping bagels.

Thus, Green '951 teaches that the serrated edge not only grasps the food but cuts it in a forward motion as well. Therefore use of Green '951's upwardly extending serrated spoon instrument, whether used right side up or upside down, is not suitable for use with the delicate wall of the bagel, due to the forward motion of the serrated spoon, and the detrimental effects of ripping the delicate bagel wall.

Thus, the general use of Green '951's upwardly extending serrated spoon, in conjunction with scooping bagels innards of dough, would be suspect as to its effectiveness or expectation of success, unless the upward orientation of the concave portion were reversed downwardly.

preferably substantially perpendicular to the handle, so that it can be scooped rearwardly.

Simply using a serrated spoon with bagel scooping would be dangerous because the forward pushing motion could cause the spoon to slip right into the hand of the user holding and stabilizing the bagel, whereas holding the bagel itself in front of the bagel scooper and pulling rearward away from the holding hand of the user would not cause any slipping or possible cutting of the user's hand or ripping of the delicate bagel wall.

Additionally, the hand-held manipulation of the bagel scooper allows the user to remove unwanted dough from a bagel without physical stress or strain to user's hand or wrist, avoiding carpal tunnel problems.

The use of the downwardly extending scoop recess in the present invention for bagel scooper, with downward and rearward pulling, would be discouraged, if not clearly taught away from the spoon of Green '951.

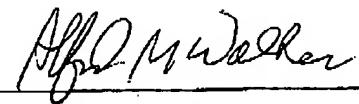
Thus, contrary to the position of the Examiner concerning the use of a serrated spoon as in Green '951, is not only not suggested, but would be discouraged or taught away by the Green '951 and Thomas '307 references relied on.

Therefore, the rejections of the Claims under 35 USC 102(b) or 35 USC 103 should now be withdrawn.

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Applicant submits that the application is in condition for allowance, which allowance is earnestly solicited.

Respectfully submitted,



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CERTIFICATE OF MAILING

I hereby certify that this correspondence is being deposited by fax to Commissioner for Patents at 703-872-9306 on the date indicated below.

Date: January 13, 2005

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